

Message Text

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ACTION EA-14

INFO OCT-01 ISO-00 PM-07 NSC-07 SP-03 SS-20 RSC-01 CIAE-00

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TO SECSTATE WASHDC 4758

INFO SECDEF

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CINCPACAF

CINCPACFLT

CINCPACREPPHIL

13TH AF

405 CSG

C O N F I D E N T I A L SECTION 1 OF 2 MANILA 7699

E.O. 11652: GDS

TAGS: MARR, US, RP

SUBJECT: MBA ARTICLE XIII - INTER SE OFFENSES

REF: (A) STATE 132783

(B) MANILA 5847

SUMMARY: EMB CONCURS THAT STATUS OF ART. XIII 1 (B) IS AS STATED IN REFTEL (A) BUT SEEKS ADVICE OF CURRENT THINKING RELATING TO GOP PROPOSAL RE: SERIOUS INTER SE OFFENSES INVOLVING PHIL DEPENDENT. WHILE CJIC HAS BEEN SUCCESSFUL, IT IS NOT A POLICY MAKING BODY; THEREFORE, EMB REQUESTS RECONSIDERATION OF AMENDED EXCHANGE OF NOTES ON DEFINITION OF INTER SE. EMB QUESTIONS EXCLUSION OF ADULTERY AND CONCUBINAGE FROM INTER SE CATEGORY. TECHNICAL PANEL TALKS TO RESUME POSSIBLY NEXT 10 DAYS, THEREFORE, REQUEST COMMENTS ASAP. END SUMMARY.

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1. DEPT'S COMMENTS IN REFTEL (A) APPRECIATED. EMB

CONCURS THAT STATUS OF PARA 1 (B) OF ART. XIII IS AS DESCRIBED IN MANILA 1926 (1972 SERIES) AND REITERATED IN PARA 1 REFTEL (A). HOWEVER, GOP PROPOSAL RE: SERIOUS INTER SE OFFENSES INVOLVING PHIL DEPENDENT WAS ONLY WITHDRAWN WHEN 1971-72 TECHNICAL PANEL TALKS WERE SUSPENDED AND EMB ANTICIPATES, UNLESS WE CONCUR IN TABLED GOP PROPOSAL, THAT IT WILL BE RESURRECTED IN FORTHCOMING NEGOTIATIONS. IN LINGH OF DEPT COMMENTS IN PARA 7 REFTEL (A), EMB WOULD LIKE PRESENT WASHINGTON THINKING WHETHER ADDITIONAL WORDING RELATING TO SERIOUS OFFENSES AS TABLED BY PHILS IN 1971 SHOULD BE ENCOURAGED IF GOP STILL DESIRES PHIL DEPENDENT EXCEPTION TO INTER SE OR WHETHER USG WILL ACCEPT THE OVERALL PHIL DEPENDENT EXCEPTION IN INTER SE CASES IN EXCHANGE FOR AGREEMENT ON ALL OTHER USG PROPOSED CRIMINAL JURISDICTION PARAGRAPHS AND OFFICIAL DUTY PROCEDURES.

2. IN ANY EVENT, WHATEVER WORDING IS EVENTUALLY NEGOTIATED AS TO THE INTER SE CATEGORY, THE DEFINITIONAL PROBLEM WILL REMAIN UNLESS SOME UNDERSTANDING IS REACHED ON MEANING OF "OFFENSES SOLELY AGAINST THE PERSON OR PROPERTY OF A MEMBER OF THE US ARMED FORCES OR CIVILIAN COMPONENT OR A DEPENDENT." APPRECIATE THAT THIS HAS BEEN A PROBLEM IN OTHER COUNTRIES, BUT PRESENT GOP APPROACH GOES BEYOND THE PROBLEM OF WORD "SOLELY" AND MAKES LITERAL INTERPRETATION OF PERSON AND PROPERTY OFFENSES VIS A VIS THEIR CRIMINAL CODE.

3. EMB AGREES THAT CJIC HAS BEEN VERY SUCCESSFUL IN RESOLVING CRIMINAL JURISDICTION PROBLEMS BUT IT SHOULD BE STRESSED SUCCESS THAT HAS BEEN OBTAINED IS A RESULT OF VERY CAREFUL HANDLING OF AD HOC APPROACHES TO EACH CASE WITH THE US MILITARY LEGAL OFFICERS MMMTO DATE BEING ABLE T FIND PRACTICAL SOLUTIONS TO SUCH CASES AND THUS TO AVOID DOCTRINAIRE CONFRONTATIONS. GOP PANEL HAS COOPERATED WELL IN SEEKING TO FIND PRAGMATIC SOLUTIONS TO PROBLEMS, BUT CHIEF STATE PROSECUTOR NOCON HAS NO POLICY-MAKING AUTHORITY AND WE CONTINUE TO OPERATE UNDER JUSTICE SECRETARY'S
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LITERAL INTERPRETATION OF INTER SE PROVISION... THEREFORE, THE WORDING DEPT SUGGESTED IN PARA 5 REFTEL (A) WILL RESOLVE NO PROBLEMS BUT MERELY CONTINUE THE AD HOC PRACTICES PRESENTLY BEING UTILIZED IN CJIC. IT SHOULD BE NOTED THAT GOP DOES NOT MERELY QUESTION OUR ASSERTION OF INTER SE IN PRACTICALLY ALL CASES BUT, IN FACT, REJECTS OUR ASSERTION AND SEEKS TO CONTINUE TO EXERCISE JURISDICTION. IT IS ONLY BECAUSE, AS HAS BEEN

POINTED OUT, OTHER METHODS ARE FOUND BY US MILITARY AUTHORITIES, AFTER DISCUSSION IN CJIC THAT PROBLEM OF JURISDICTION HAS BEEN ABLE TO BE FINESSED. OUR ADROITNESS TO DATE IS NO GUARANTEE THAT SOONER OR LATER CONFRONTATION WILL NOT OCCUR ON A SERIOUS INTER SE CASE.

4. CONSEQUENTLY, EMB REQUESTS RECONSIDERATION OF PROPOSED EMB EXCHANGE OF NOTES AS AMENDED. WE WOULD ONLY TABLE SUCH PROPOSAL IF DURING DISCUSSION OF INTER SE WE DETERMINE THAT THIS IS THE ONLY WAY TO ATTEMPT TO FORMALIZE A WORKABLE DEFINITION OF INTER SE. WE BELIEVE IT IMPORTANT TO ADDRESS THIS ISSUE DIRECTLY IN FORTHCOMING NEGOTIATIONS IN THE CONTEXT OF THE WORDING TO PARA 1 (B), AND IF GOP CONTINUES TO MAINTAIN THE RIGHT TO UTILIZE THEIR CRIMINAL CODE IN DETERMINING INTER SE OFFENSES, WE DEEM IT NECESSARY TO OBTAIN AN AGREED DEFINITION. EMB PROPOSED EXCHANGE OF NOTES, AS AMENDED, IS ONE METHOD THAT MAY BE VIABLE. THE AMENDED EMB NOTE WOULD READ AS FOLLOWS, TAKING INTO CONSIDERATION DEPT'S COMMENTS AND BASING IT UPON PRESENT USG PROPOSED WORDING OF PARA - (B). QUOTE THE EMB OF USA PRESENTS ITS COMPLIMENTS TO THE DFA OF REPUBLIC OF THE PHILIPPINES AND HAS THE HONOR TO REFER TO THE RECENT AMENDMENT OF PARAGRAPH - (B) OF ARTICLE XIII OF THE MBA AND TO THE DISCUSSIONS BETWEEN OFFICIALS OF THE TWO GOVERNMENTS ABOUT OFFENSES THAT FALL WITHIN THE PURVIEW OF THAT PARAGRAPH. PARA THE EMB WISHES TO PROPOSE THE FOLLOWING CRITERIA IN

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C O N F I D E N T I A L SECTION 2 OF 2 MANILA 7699

E.O. 11652: GDS
TAGS: MARR, US, RP
SUBJECT: MBA ARTICLE XIII - INTER SE OFFENSES

ORDER TO DETERMINE THE OFFENSES WHICH WILL BE CONSIDERED TO BE WITHIN THE CITED PARAGRAPH. PARA WHEN A MEMBER OF THE UNITED STATES ARMED FORCES IS CHARGED WITH AN OFFENSE IN WHICH THE VICTIM OF THE OFFENSE IS ALSO A MEMBER OF THE UNITED STATES ARMED FORCES, CIVILIAN COMPONENT OR DEPENDENT THEREOF, SUCH OFFENSE IS CONSIDERED TO BE WITHIN THE PROVISIONS OF ARTICLE XIII 1 (B). PARA IF THE SAME CRIMINAL ACT COMMITTED BY A MEMBER OF THE UNITED STATES ARMED FORCES RESULTS IN CHARGES OF TWO OR MORE DIFFERENT OFFENSES, AND IN ONLY ONE OR MORE OF SUCH OFFENSES, THE VICTIM IS A MEMBER OF THE UNITED STATES ARMED FORCES, CIVILIAN COMPONENT OR DEPENDENT THEREOF, THEN ONLY SUCH AN OFFENSE OR OFFENSES WILL BE CONSIDERED WITHIN THE PROVISIONS OF ARTICLE XIII - (B) AND ALL OTHER OFFENSES
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SHALL BE CONSIDERED NOT WITHIN THAT CATEGORY. PARA UPON RECEIPT OF A NOTE FROM THE DFA INDICATING THAT THE FOREGOING IS ACCEPTABLE TO THE GOVERNMENT OF THE REPUBLIC OF THE PHILIPPINES, THE UNITED STATES GOVERNMENT WILL CONSIDER THAT THE NOTE AND THE REPLY THERETO CONSTITUTE AN AGREEMENT BETWEEN THE TWO GOVERNMENTS ON THIS SUBJECT, WHICH SHALL TAKE EFFECT CONCURRENTLY WITH THE DATE OF EFFECTIVITY OF THE REVISED ARTICLE XIII PARAGRAPH 1 (B) WHICH IT IMPLEMENTS.
UNQUOTE.

5. EMB ALSO CONCERNED WITH DEPT'S OBSERVATION THAT THEY WOULD BE HARD PRESSED TO ASSERT INTER SE IN ADULTERY AND CONCUBINAGE CASES WHEN THIRD PARTY INVOLVED IS A PHIL CITIZEN WHO IS NOT A DEPENDENT. WE CONCUR THAT PERHAPS BIGAMY MAY BE IN DIFFERENT CATEGORY. HOWEVER, TO EXCLUDE SUCH OFFENSES MERELY BECAUSE OF A NON-MBA THIRD PARTY INVOLVED AS JOINT PERPETRATOR WOULD SEEM TO BE UNDULY NARROW INTERPRETATION. IT HAS BEEN OUR UNDERSTANDING THAT IN OTHER

OFFENSES WHERE THERE ARE JOINT PERPETRATORS, ONE OF WHICH IS US SERVICEMAN AND CRIME IS AGAINST US PROPERTY OR MBA PERSON THAT TRIAL OF OFFENDERS CAN BE SEPARATED AND INTER SE WOULD APPLY TO US SERVICEMAN OFFENDER. TO ANALYZE ADULTERY AND CONCUBINAGE OFFENSES ONE MUST FIRST IDENTIFY THE PLAYERS AND DECIDE WHO ARE THE VICTIMS AND WHO ARE THE PERPETRATORS. IN INTER SE SITUATION, IT WOULD APPEAR THAT VICTIM OF ADULTERY OR CONCUBINAGE WOULD BE MBA WIFE OR HUSBAND WHILE JOINT PERPETRATOR IN ORDER FOR INTER SE TO APPLY, WOULD BE US SERVICE PERSON AND NON-MBA THIRD PARTY. IF SO, THEN SERVICE PERSON OFFENSE WOULD BE INTER SE AND NON-MBA THIRD PARTY OFFENDER WOULD NOT BE INTER SE AND SEVERABLE. THUS, THE JOINT PERPETRATORS OF SUCH OFFENSES COULD BE SEPARATED (EXCUSE THE PLAY ON WORDS) AND BE TRIED UNDER DIFFERENT JURISDICTION LIKE ANY OTHER JOINT OFFENSE WITH SAME CAST OF CHARACTERS. THEREFORE, IT WOULD SEEM THAT ADULTERY OR CONCUBINAGE OFFENSE AS COMMITTED BY THE US SERVICEMAN IS AN OFFENSE "SOLELY" AGAINST ANOTHER MBA PERSON AS THE NON-MBA THIRD PARTY HAS COMMITTED IN EFFECT HER OR HIS OWN

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SEPARATE OFFENSE AND CAN BE PROSECUTED FOR SUCH. THE ONLY WAY NOT TO ARRIVE AT INTER SE ASSERTION IS TO STATE THAT NON-MBA THIRD PARTY TO ADULTERY AND CONCUBINAGE IS ALSO A VICTIM. IF SO, DEPT HAS NOT BEEN READING SAME BOOKS AS EMBOFFS. THE ONLY OTHER WAY TO ARRIVE AT A COMPLETELY NON-INTER SE OFFENSE UNDER ABOVE FACTS IS TO COME TO CONCLUSION THAT THE STATE IS A VICTIM. IF YOU TAKE THIS CONCLUSION IT COULD BE DANGEROUS AS SUCH COULD BE APPLIED TO ALL CRIMINAL OFFENSES.

IN ANY EVENT, IF CONCUBINAGE AND ADULTERY OFFENSES, WHEN JOINT OFFENDER IS NOT UNDER MBA, IS NOT TO BE CONSIDERED INTER SE, IT WOULD BE HELPFUL TO HAVE INSTRUCTIONS TO THAT EFFECT SO THAT THE MILITARY WILL NO LONGER ASSERT INTER SE UNDER SUCH CIRCUMSTANCES. RECEIPT OF SUCH INSTRUCTIONS WOULD RESOLVE SOME OF THE DIFFICULTY WE ARE EXPERIENCING.

6. GOP TECHNICAL PANEL WILL BE IN POSITION TO REACTIVATE TALKS IN NEAR FUTURE. THEREFORE, REQUEST COMMENTS OR RECOMMENDATIONS IN ADDITION TO DRAFT NOTE OFFICIAL DUTY PER PARA 8 REFTL (A) ASAP.

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